No. 94-23

IN THE
Supreme Court of the United States

October Term, 1993

CITY OF EDMONDS,

Petitioner,

vs.

WASHINGTON STATE BUILDING CODE COUNCIL, et al.,

Respondents

On Petition for a Writ of Certiorari
to the
United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS OXFORD HOUSE, INC., OXFORD HOUSE EDMONDS AND HERB HAMILTON

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QUESTION PRESENTED

The Fair Housing Amendments Act of 1988 (the "FHAA") exempts from its mandates "reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1). The City of Edmonds' zoning code places no limit on the number of related persons allowed to live together in a single-family zone, but restricts the number of unrelated persons allowed to live together in that zone to no more than five, regardless of the size of the dwelling.

The question presented is whether the City's zoning provision falls within the FHAA's exemption for reasonable maximum occupancy standards.

LIST OF PARTIES AND RULE 29.1 LIST

City of Edmonds, Washington

United States of America

Oxford House-Edmonds

Oxford House, Inc.[1]

Herb Hamilton

Parties Dismissed[2]

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[1]Oxford House, Inc. has no parent or subsidiary companies.

[2]The following parties have been dismissed by order of the District Court: Washington State Building Code Council; City of Everett, Washington; Oxford House-Hoyt; United States - Department of Housing and Urban Development; Jack Kemp and Richard L. Bauer.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 18 F.3d 802 (9th Cir. 1994). The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1994. The petitioners have invoked the jurisdiction of this Court under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Fair Housing Amendments Act of 1988 42 U.S.C. § 3601 et seq. and City of Edmonds Community Development Code sections involved appear in the petition (Pet. 2 - 8). The applicable Washington State statute RCW 35A.63.240 is set forth on pages 13, 14 herein.

STATEMENT OF THE CASE

Procedural History

On February 14, 1991 the City of Edmonds filed a declaratory judgment action seeking a determination that its single-family zoning rule barring five or

more unrelated persons from living in Oxford House Edmonds does not discriminate on the basis of handicap in violation of the Fair Housing Amendments Act, as amended, 42 U.S.C. § 3601 et seq. (hereinafter the "FHAA" or the "Act"). City of Edmonds v. United States Department of Housing and Urban Development, No. C-91-215 WD (Western District of Washington).

On September 12, 1991, the United States filed its complaint alleging that the City had violated the Act by refusing to make a reasonable accommodation necessary to afford handicapped persons an equal opportunity to use and enjoy a dwelling. United States v. City of Edmonds, No. C91-1273WD (Western District of Washington). On cross motions for

summary judgment, the court granted the City's motion for summary judgment and denied the motions filed by the respondents (hereinafter collectively "Oxford House") and by the United States. The same day the court entered final judgment on its order pursuant to Fed. R. Civ. P. 54(b), holding that the Edmonds single-family zoning law was exempt from the Fair Housing Act, 42 U.S.C. 3601 et seq. Oxford House filed a motion for reconsideration on July 17, 1992; the court denied the motion on July 22, 1992.

On August 12, 1992, Oxford House filed a notice of appeal. The United States of America filed a notice of appeal on September 14, 1992. By stipulation of the parties, the appeals

were consolidated pursuant to Fed. R. App. 3(b).

The Ninth Circuit Court of Appeals reversed the district court and found that the Act did not exempt Edmonds' zoning ordinance from the statute's prohibition against discrimination based on handicap. It reasoned that exempting the City's zoning provision would undermine a principal purpose of the FHAA, which is to require reasonable accommodation in zoning laws when necessary to provide disabled persons with reasonable access to housing opportunities.

Facts

Oxford House Edmonds is a leased six-bedroom house where 10-12 recovering

adult alcoholics and drug addicts reside in Edmonds, Washington. The residents are 'handicapped' persons under the FHAA's statutory definition. 42 U.S.C. § 3602(h). Oxford House Edmonds is one of 17 recovery houses in Washington state. It operates under a charter issued by Oxford House, Inc., and in compliance with the provisions of the Anti-Drug Abuse Act, 42 U.S.C.A. 300x-25 (ADAA), which provides start-up loans for houses meeting the ADAA requirements for non-use of alcohol and drugs, self-support and democratic operation.

Oxford House Edmonds is self-supporting and democratically governed. Its rules require expulsion of any resident who uses alcohol or drugs. Under the Oxford House approach, members

provide counseling and mutual support to each other. The residence operates like a family. The Oxford House approach has been so effective that Congress adopted the Oxford House model as the pattern for self-run, self-financed recovery houses across the country in the ADAA.

The parties stipulated that Oxford House Edmonds cannot viably operate at its current location in Edmonds and at the same time comply with the zoning limitation of 5 unrelated persons. The house must have enough residents to provide a supportive atmosphere for successful recovery, to ensure financial self-sufficiency, and to comply with federal requirements for the receipt of state start-up loans. 42 U.S.C. 300x-25.

The house must also be close to public transportation and located in a good residential neighborhood, away from commercial zones, liquor stores, and areas associated with opportunities for alcohol and drug abuse.

In the summer of 1990, Mark Spence, an Oxford House outreach worker under contract with the Washington Division of Alcohol and Substance Abuse, was in Edmonds to locate a suitable location for Oxford House Edmonds. After looking at several homes within the City, Mr. Spence chose the house at 8704-216th Street SW because it met the established criteria. The house has six bedrooms, is located in a good single-family neighborhood, and is close to a bus line. The parties have stipulated that Oxford House Edmonds'

actual impact on City services and infrastructure is not qualitatively or quantitatively different from the impact of a household of related persons, of the same age and number, in the same location.

Because Oxford House Edmonds is located in a "single family" zone, the Edmonds Community Development Code (ECDC) limits the occupancy of the home to a "family", which the ECDC defines as any number of persons related by adoption, marriage, or genetics, or a group of five or fewer unrelated persons.
ECDC § 21.30.010.

Because its members are not a "family" under the ECDC definition, use of the house by Oxford House Edmonds as a residence for more than 5 unrelated

persons violates the ECDC. Despite a request by Oxford House Edmonds, the City declined to make a reasonable accommodation in its zoning ordinance that would have allowed Oxford House Edmonds to remain in its chosen location.

REASONS FOR DENYING THE WRIT

The question presented is now moot due to an intervening change in state law. The Ninth Circuit opinion was clearly correct and the inter-circuit conflict noted by petitioner seems to be working its way out as almost every other decision addressing this issue has come to the conclusion reached by the Ninth Circuit below.

I. Resolving the Conflict Would Not Affect the Outcome in this Case Due to an Intervening Change in State Law

The Supreme Court should deny certiorari because the Supreme Court resolution of the conflict between the circuits will not affect the outcome between the parties. Sommerville v. United States, 376 U.S. 909 (1964).

RCW 35.63A is the state statute governing the City of Edmonds' planning and zoning authority, Petition p. 11. Due to a recent amendment to this statute, the City is now prohibited by state law from maintaining any zoning ordinance that treats handicapped persons differently than it treats families. RCW 35A.63.240. This amendment to state law occurred after briefing was complete before the Ninth Circuit, and the state

law issue was not addressed in the Ninth Circuit determination.

By Washington State Senate Bill 5584, effective July 25, 1993, the Washington state legislature added a new section to chapter 35A.63 RCW to read as follows:

> No city may enact or maintain an ordinance, development regulation, zoning regulation or official control, policy, or administrative practice which treats a residential structure occupied by persons with handicaps differently than a similar residential structure occupied by a family or other unrelated individuals. As used in this section, "handicaps" are as defined in the federal fair housing amendments act of 1988 (42 U.S.C. Sec. 3602).

RCW 35A.63.240.

Thus, regardless of the outcome of this case, the City of Edmonds must under state law provide equal treatment in its

zoning rules to handicapped persons and families. The Supreme Court should deny certiorari because it cannot grant the petitioners the effectual relief they seek.

The Supreme Court should deny certiorari even assuming arguendo that the issue might conceivably affect the rights of others in states which have not adopted a similar state law. As this Court unanimously held Tiverton Bd. Of License Comm'rs v. Pastore, 469 U.S. 238 (1985): "Such speculative contingencies afford no basis for our passing on the substantive issues [the petitioner] would have us decide, in the absence of 'evidence that this is a prospect of immediacy and reality.'" Id. at 240 (citations omitted).

II. The Ninth Circuit Opinion Is Clearly Correct.

The Ninth Circuit decision in City of Edmonds correctly recognized that Congress intended to apply the Fair Housing Amendments Act to widely prevalent zoning rules that have been found constitutional, and hence to grant additional protections to disabled persons. Congress has the power to confer greater rights than afforded by the constitution. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

In the FHAA Congress explicitly gave greater protection to the disabled than the constitution alone provides. As the Petitioner observes, the constitution permits cities to drastically limit the number of unrelated people who can live together in single-family zones. Village

of Belle Terre v. Boraas, 416 U.S. 1 (1974) (zoning rule barring more than two unrelated persons from occupying a single-family-zoned dwelling is not unconstitutional). The Ninth Circuit properly recognized that Congress could not have intended to totally exempt from FHAA scrutiny zoning use classifications[3] that can have devastating impact upon housing opportunities for disabled persons.

Petitioner expresses concern that the Ninth Circuit interpretation of the

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[3]A different type of occupancy limit, which relates the maximum number of occupants to the amount of space in a room or dwelling, and can constitutionally be applied to all persons whether related or not, is the type of occupancy limit that § 3607(b)1 exempts from FHAA scrutiny. City of Edmonds, 18 F.3d at 804-05. See also City of St. Louis, 843 F. Supp. at 1573-74.

FHAA exemption will "overturn single-family zoning." Petition p. 23. This is not the case. The validity of single-family zoning has not been challenged. The general applicability of limits on unrelated people living together in single-family zones is not in question. The Ninth Circuit decision means only that such zoning use classifications are subject to FHAA review to assure that they do not discriminate against persons with disabilities.

III. The Great Majority of Courts Are Not Following the Eleventh Circuit Position.

This court should not grant the petition for writ of certiorari based on conflict between the Ninth and Eleventh Circuits because whatever conflict exists is being worked out in the lower courts.

Even prior to the Ninth Circuit decision, three lower courts that have addressed this issue have criticized and declined to follow the position set forth in Elliot v. City of Athens, 960 F.2d 975 (11th Cir. 1992) cert. denied, 113 S. Ct. 376 (1992) concerning the § 3607(b)(1) exemption.[4] These courts carefully considered the 42 U.S.C. § 3607(b)(1)

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[4]Petitioner exaggerates the conflict that does exits. It contends that Doe v. City of Butler, 892 F.2d 315 (3rd Cir. 1989) and Familytime of St. Paul, Inc. v. City of St. Paul, Minn., 728 F. Supp. 1396 (Minn. 1990), aff'd, 923 F.2d 91 (8th Cir. 1991) conflict with the Ninth Circuit decision below in the present case. (Pet. 24) This is not correct. Those two decisions address only the constitutionality of occupancy restrictions and do not address their validity under the FHAA. There is therefore no conflict between these cases and the Ninth Circuit decision on the question posed by the Petitioner - the proper interpretation of the 3607(b)(1) exemption in the Fair Housing Amendments Act.

exemption and rejected the Eleventh Circuit's interpretation. See Oxford House v. City of St. Louis, 843 F. Supp. 1556, 1573-75 (E.D. Mo. 1994); Oxford House v. City of Virginia Beach, 825 F. Supp. 1251, 1258-59 (E.D. Va. 1993); Parish of Jefferson v. Allied Health Care, Inc., 1992 WL 142754 (E.D. La. 1992). See also Cox et al. v. Township of Upper St. Clair, No. 93-1443 (W.D. Pa. May 18, 1994) (memorandum decision denying motion to dismiss) (criticizing Elliot).

The only support for the Eleventh Circuit position is an unreported one and one-half page order on summary judgment from the Northern District of Texas. Elderhaven, Inc. v. City of Lubbock, No. 5:92-CV-136-C (N.D. Tex. June 14,

1994) (order granting summary judgment). Without any analysis of Elliot's interpretation of FHAA § 3607(b)(1) and without reference to the Ninth Circuit decision in City of Edmonds, the order states a summary conclusion that Lubbuck's ordinance is a reasonable restriction regulating the number of occupants who may occupy a dwelling. This decision has been appealed to the Fifth Circuit Court of Appeals.

Thus, almost every court to address the issue since Elliot, including the Ninth Circuit, has decided that the Eleventh Circuit position is incorrect. (It would not be surprising if the Eleventh Circuit were to revise its position to conform the majority view when it next considers this issue).

Review in this Court is not required because the lower courts are resolving the issue themselves.

Finally, the pendency of two circuit court appeals on this same issue—combined with the state law question now presented in this case—weigh in favor of allowing more time to pass before accepting review. The City of St. Louis case has been appealed to the Eighth Circuit Court of Appeals, and the Elderhaven v. City of Lubbock case had been appealed to the Fifth Circuit. These will be the first appeals courts to weigh the Ninth Circuit position in City of Edmonds against the Eleventh Circuit position in Elliot. Unless the conflict further develops through divergent opinions in these

future cases, there is no need for the Supreme Court to grant review. And, if review does become appropriate in the future, the case chosen for review would not have the state law question that necessarily affects the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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